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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-252

LARRY MEACHUM, et al.,
PETITIONERS,

v.

ARTHUR FANO, et al.,
RESPONDENTS.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

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Opinions Below

This case has come before the court following an opinion of the United States Court of Appeals of the First Circuit which is reported at 520 F.2d 374 (June 27, 1975). The Court of Appeals affirmed in a two-to-one decision an opinion of the United States District Court for the District

of Massachusetts, reported at 387 F. Supp. 664 (D. Mass. 1975). Both opinions are contained in the Appendix. References hereinafter will be made to the applicable Appendix page number.

The District Court stayed part of its preliminary injunctive order pending appeal to the Court of Appeals by the petitioners. (App. 2) The Court of Appeals stayed the remainder of the District Court's order pending their decision on the merits of the appeal. (App. 142) The court further stayed issuance of the mandate pending the disposition by this court of the petition for writ of certiorari. This court granted certiorari on December 8, 1975.

Jurisdiction

The petitioners have invoked jurisdiction of this court pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Commonwealth of Massachusetts has sufficiently created an interest in remaining in any one prison to be cognizable as "liberty" or "property" under the Fourteenth Amendment of the Constitution.

2. Whether a prison inmate who is transferred, within a state, from a medium security institution to a maximum security institution, when there is no imposition of disciplinary punishment at the receiving institution, is entitled, by virtue of the due process clause of the Fourteenth Amendment, to more than a notice of the proposed transfer and an opportunity to be heard in opposition.

3. Whether the due process clause requires the disclosure of informant information when, in the judgment of prison officials, such disclosure would create a substantial likelihood of harm to the informants.

Statement of the Case

This action was brought in the District Court of Massachusetts pursuant to 42 U.S.C. § 1983. Jurisdiction was alleged under 28 U.S.C. § 1343. The action was originally commenced by seventeen inmates confined to the Massachusetts Correctional Institution at Norfolk, a medium security prison within the Commonwealth of Massachusetts. Six inmates, the respondents here, later filed an amended complaint seeking declaratory and injunctive relief as well as damages. (App. 16) Respondents sought to have their imminent transfer from MCI, Norfolk to MCI, Walpole, the maximum security institution enjoined. The respondents, [hereinafter referred to as the "plaintiffs"], had been ordered transferred from Norfolk to Walpole by the Commissioner of Correction following a classification hearing.[1] These classification boards had

[1] There were no permanent regulations in the Massachusetts correction system, prior to March, 1975, which dealt with classification issues. Commissioner's Bulletin 72-1, which appears at page 109 of the appendix, was the official disciplinary policy of the Massachusetts correction system. It was not applicable to classification proceedings. Until March of 1975 the department operated with drafts of procedures and various informal procedures. None of these appear in the record before this court.

It is important to note that the MCI, Walpole regulations discussed by both of the courts below *absolutely were not official departmental regulations.* They were *draft procedures* followed at MCI, Walpole and at no other institution in Massachusetts. The only official regulations in this record are the disciplinary regulations. The "classification" hearings that are herein referenced were not the result of official administrative procedures. They were, rather, informal actions followed on an institutional level from policies which were in the process of being enacted.

Moreover, the action of the district judge in taking judicial notice of the disciplinary procedures in effect at Walpole effectively denied the defendants of their opportunity to be heard within the meaning of Rule 201(e) of the Federal Rules of Evidence. It was not apparent to either of the parties that judicial notice was to be taken until after the release of the District Court opinion. Aside from the questions which arise from the manner of taking

been presented information by the superintendent of the institution from inmate informants which linked the plaintiffs to various disruptive activities occurring within the institution, including the setting of numerous fires.

On August 31, 1974 there was a fire at MCI, Norfolk. This was the first of nine serious fires which were to plague the institution throughout the late summer and fall of 1974. A second fire occurred on September 12, 1974. A third fire occurred on October 13. There were two additional, and separate, fires on October 16. Another fire occurred on October 17. There were two more fires on October 21 and yet another fire on October 23. Each of these fires within the institution required the assistance of the fire departments from the surrounding communities. (App. 123-127) Indeed, the record reflects that on October 23 a fire occurred lasting between four and five hours requiring no less than forty-four firefighters from the surrounding communities to engage in controlling the blaze. (App. 124-127)

There were numerous other fires occurring within the institution which did not require the summoning of outside fire departments. On October 22 there were two separate fires. One in room 2-15 of the school building at the institution in which curtains and window shades showed fire damage. The exact time of the fire was unknown. The second October 22 fire occurred in a waste basket at the hospital. Its origins were unknown. (App. 123-124) All told, during the period between October 13 and October 31, 1974, damage in excess of $100,000 was reported at the institution. There was a loss of two living units and

judicial notice, the defendants seriously question the materiality of the *disciplinary* procedures in effect at Walpole to control the question of what *classification* procedures were being followed at Norfolk. It is also not unimportant to note that the only regulations introduced into evidence at the trial below were the departmental disciplinary procedures, Commissioner's Bulletin 72-1.

a partial loss of the laundry in the institution. (App. 120-123)

At some time during the month of October 1974, information was presented to Superintendent Meachum by inmate informants within the institution which linked the plaintiffs to the disruptions occurring at the prison. On October 16, 1974, plaintiff McPherson was taken from the general population at the institution and placed in a cell in the Receiving Building at MCI, Norfolk. On October 24, 1974, the plaintiffs Fano, DeBrosky, Dussault, Hathaway, and Royce were taken from the general population at Norfolk and placed in the Receiving Building. On October 25, 1974, the plaintiffs were given disciplinary reports. In each instance the subject matter of the disciplinary reports had been referred to the local district attorney for investigation and prosecution pursuant to Mass. General Laws, c. 127, § 38C.[2] (App. 56)

On November 4, 1974, the plaintiffs were served with general notices that they were to receive classification hearings before a department review board, to determine their custody status and a possible transfer. Fano, DeBrosky, and Dussault received the following notice:

> "The department has received information through a reliable source that you were in possession of instruments that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.
>
> These items and plans occurred during the period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to lives of

[2] Because of §VII(d) of Commissioner's Bulletin 72-1 no institutional hearing was held on the subject matter of the disciplinary reports. The defendants determined they were barred by the regulations from holding disciplinary hearings to impose institutional sanctions. (App. 118).

persons at MCI, Norfolk as well as serious property damage."

The plaintiffs Hathaway and McPherson received the following notice:

"The department has received information through reliable sources that you were significantly involved in the planning and execution of one or more of the serious fires occurring within MCI, Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety."

Inmate Royce was informed of the following:

"The department has received information through a reliable source that you were involved in the trafficking of contraband in MCI, Norfolk (narcotics, barbiturates and/or amphetamines).

This occurred during a period of serious unrest at MCI, Norfolk which included many fires, that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage." (App. 63-67)

On November 6, as well as on November 8, 11 and 13, classification hearings on a possible transfer were held for each of the plaintiffs on the information referenced in the classification notices. Each plaintiff was afforded a personal hearing before the classification board. Each inmate was represented by counsel or a law student. Each was allowed to make a personal statement to the board. All were allowed to present evidence in their behalf and, indeed, the record reflects that certain plaintiffs called correction officers and some submitted written statements

by correction officers on behalf of certain plaintiffs. The classification board heard evidence from each of the plaintiff's social workers concerning their activities within the institution. (App. 58-59; See also App. 68-109)

The classification hearings were opened by the board reading a prepared statement. Following the statement the board asked the plaintiff and his attorney to leave the hearing room while the board received informant information from Superintendent Meachum. In each instance Meachum appeared before the classification board and testified as to the information given to him and the reliability and credibility of the informant or informants. (App. 58, 143-144) The board earlier had refused to call and question the informants themselves but it did probe into the reliability of the informants through Meachum, who provided the board with a record of prior instances of each informant's information having proved reliable. (App. 143-144; Also, App. 68, 75, 81-82, 92, 100, 105) After Meachum completed his testimony each plaintiff was brought back into the hearing and testimony continued. At the conclusion of each hearing, the board announced its recommendations. Hathaway and DeBrosky were to be transferred to MCI, Bridgewater. Fano, Dussault, and McPherson, were ordered transferred to MCI, Walpole. Charles Royce was recommended to be held in administrative segregation for thirty days and was to be given a second classification hearing at the end of that time. The plaintiffs were orally informed by the board following the conclusion of the hearings that the information presented to it by Superintendent Meachum was the basis of the board's decisions and recommendations. (App. 59, 60; Also 68-109)

Each plaintiff except Royce appealed to the commissioner to review the board determination and to request

that the commissioner order that they be once again placed in general population at Norfolk. The Commissioner of Correction personally reviewed the appeals. He did not make an independent investigation other than speaking with members of the classification board and Superintendent Meachum. Except for these conversations the Commissioner of Correction relied wholly upon the written reports prepared by the classification board for him, and recommendations of the board. In each case, the appeal of the plaintiffs was denied. The recommendation of the board in the case of Fano, Dussault, Hathaway and McPherson was upheld by the commissioner. The appeal of DeBrosky resulted in the commissioner's recommendation to transfer DeBrosky to MCI, Walpole rather than MCI, Bridgewater. The commissioner overruled the board with respect to the plaintiff Royce. The commissioner directed that Royce be transferred to MCI, Walpole rather than remaining in administrative segregation at Norfolk. (App. 60-61)

Royce was notified of the commissioner's decision in a memorandum dated November 21, 1974. Each of the other plaintiffs was notified of the commissioner's decision by a letter directed to their attorney. Each letter clearly indicated that the recommendations of the classification board were implemented only after considerable thought and evaluation of the informant information and the reliability of that information. (App. 50-53)

Sometime subsequent to Commissioner Hall's decision, the plaintiffs were transferred to MCI, Walpole. At MCI, Walpole they were subject to no administrative punishment. They suffered no loss of good time and were not placed in segregation. As a matter of course the fact of the transfer was noted on their institutional record and would, therefore, be considered by various administrative

agencies within the Department of Correction.[3] Furloughs were available at MCI, Walpole, and remained available to each plaintiff upon eligibility at Walpole.

Summary of Argument

1. There is no constitutionally-recognized interest, protected by the Fourteenth Amendment, which circumscribes the power of a state to transfer an inmate from one prison to another. The due process clause of the Fourteenth Amendment operates only to protect identifiable liberty or property interests which are either inherent in the Constitution or created by virtue of a state statute, regulation or pattern of conduct. The petitioners contend that the Commonwealth of Massachusetts has created no such liberty or property interest which the Constitution protects and they further argue that there is, in the Constitution, no inherent liberty interest which would prevent the state from transferring a prisoner from one prison to another within his jurisdiction of commitment.

The Court of Appeals for the First Circuit has focused its attention on the "weight" of the interest asserted by the state prisoners rather than on the "nature" of the claim and has rested a subjective judgment on loss to the individual inmate. Petitioners contend that while a prisoner may have a wish or desire to remain in a particular institution these wishes or desires are not constitutionally recog-

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[3] Any change in an inmate's condition or status of confinement in the Massachusetts correction system would be noted in an institutional record. The fact of the entry would, therefore, necessarily be included in the inmate's institutional record. The consideration given that institutional record by a parole board, a furlough board, or another administrative agency would vary as to the individual's entire institutional record. It may have some effect as to furlough, parole, work release, or other privileges, or it may have none at all. The result of the entry is entirely speculative.

nized interests. The loss which results to an inmate as a consequence of transfer is, accordingly, not a "grievous loss" of constitutional dimension.

There has been no interest created by the Commonwealth of Massachusetts which entitles an inmate to remain in any particular institution within its correction system. There exists no statute, regulation, or factual pattern which can be set forth to assert that any inmate has a legitimate claim of entitlement to remain in that institution. In Massachusetts, an inmate may be transferred from one institution to the other for a variety of reasons including population control, program availability, adjustment to institutional environment or numerous other factors, some of which are incapable of precise identification. Since the Commonwealth has created no such interest, there exists no "legitimate claim of entitlement" to remaining in any particular institution. Therefore, no "property" interest, cognizable by the Fourteenth Amendment, exists so as to require procedural protection.

2. If the Court should determine that some process was indeed required, petitioners contend that the Constitution was fully satisfied by a notice to the inmate of the proposed transfer and an opportunity for that inmate to be heard in opposition. There is a functional difference between a disciplinary hearing, as was the case in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and a transfer situation as represented by the instant case. When a situation is presented, such as is presented by the facts below, the decision whether or not to transfer must necessarily rest in the sound discretion of prison officials. When informants identify certain individuals as either the cause of disruption or the likely cause of disruptio at an institution, the correction officials' obligation to the informants, as well as their obligation to other inmates, dictates that they investigate the credibility and relibility of the information and

that they make a determination as to whether or not a transfer is required.

The function of a disciplinary hearing is to determine the truth or falsity of disciplinary matters. The function of a board sitting to judge whether or not a transfer should occur may consider a myriad of factors including evidence of past or predicted future misconduct. Unless procedures could be set out which would absolutely guarantee that the informants' charges could be disproved, then the source of the information must be protected by refusing to allow confrontation and by excluding any evidence which would tend to identify the informant sources. There can be no fundamental unfairness to an inmate facing transfer if he is allowed to appear before the board and argue in opposition to the transfer.

In the instant case not only were the inmates allowed to appear before the board, but they were also represented by counsel and allowed to call witnesses, present evidence, and appeal the decision of the board to the Commissioner of Correction. Further, the superintendent of the institution appeared before the board, *in camera*, and testified to the board that he had probed the credibility of the informants and the reliability of their information. The board examined the superintendent as to his information and independently determined the reliability of the information by examining the Superintendent. Such procedures fully satisfied due process.

3. The Court of Appeals for the First Circuit misapprehended this court's meaning in *Wolff* v. *McDonnell*, *supra*. The Court of Appeals erred when it referred to language in *Wolff* v. *McDonnell* as "cryptic" and, in its error, failed to appreciate the basic rationale behind *Wolff* v. *McDonnell*, which required a sensitive balancing of interests in matters of prison discipline. Prison officials deal in highly volatile situations. They must be afforded

the widest possible discretion consistent with fundamental constitutional guarantees. In the instant case, the prison officials have acted wholly within the spirit of *Wolff* in balancing the interest of both inmate and informant. In transfer cases, where both the security of the institution and the physical safety of its occupants are implicated, the Court should be hesitant to impose detailed and specific procedures. While notice and an opportunity to be heard are fundamental to any interest protected by the Fourteenth Amendment, further procedures should be left to the good faith of corrections officials and not inflexibly set into constitutional law.

Argument

I. THERE IS NO CONSTITUTIONALLY-RECOGNIZED INTEREST PROTECTED BY THE FOURTEENTH AMENDMENT WHICH CIRCUMSCRIBES THE POWER OF A STATE TO TRANSFER A PRISONER FROM ONE PRISON TO ANOTHER WITHIN THE SAME JURISDICTION OF COMMITMENT.

A. *The Due Process Clause of the Fourteenth Amendment Applies Only To Protect Recognized "Liberty" or "Property" Interests.*

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972). The Fourteenth Amendment does not operate in each and every case of governmental action because ". . . the range of interests protected by procedural due process is not infinite." *Id.* at 570.

The determination of whether the interest comes within the Fourteenth Amendment's definition of liberty or property is made by analyzing and identifying the nature of the interest and not by calculating the weight or gravity of the interest. *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Board of Regents* v. *Roth, supra; Morrissey* v. *Brewer*, 408 U.S. 471 (1972). An identification of a protected interest in property is generally more involved than when determining whether or not "liberty" within the meaning of the Fourteenth Amendment is involved because ". . . [p]rotected interests in property normally are not created by Constitution. Rather, they are created and their dimensions defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss* v. *Lopez, supra* at 572-573, quoting *Board of Regents* v. *Roth* at 577, and *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), where good time credits were accumulated under state law.[4]

Board of Regents v. *Roth*, supra, made it clear that the "weight" of the interest asserted was an improper con-

[4] This court found in *Wolff* v. *McDonnell*, supra, that the deprivation of good time credits involved a matter of "real substance" and was "sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle [the prisoner] to those minimum procedures appropriate under the circumstances and required by the due process clause to insure that the state-created right [was] not arbitrarily abrogated" 418 U.S. at 557. The fact that *Goss* v. *Lopez, supra*, talks about the *Wolff* v. *McDonnell* good time credit issue as one of a state created "property" interest and *Wolff* itself refers to the interest as "sufficiently embraced" within the Fourteenth Amendment "liberty" interest does not render *Goss* and *Wolff* inconsistent.

Since *Wolff* involved good time credits, a state created interest of monumental importance to a prisoner, as it involves the quickening of his ultimate release, a true "liberty" interest was involved. However, since the interest itself was state created it also bears those aspects of the property rights spoken of in *Goss* v. *Lopez, supra*. *Wolff* deals with a liberty interest insofar as release is always ultimately a liberty question. It is a property concept within the meaning of the Fourteenth Amendment because the right created by the state is clearly "entitlement" within the meaning of *Goss* v. *Lopez, supra*; *Board of Regents* v. *Roth, supra*; *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); and *Perry* v. *Sinderman*, 408 U.S. 593 (1972). Of course, *Wolff* may also clearly be read as finding a state-created "liberty" interest. *Id.*, at 558.

sideration in determining whether or not the right was applicable. *See also* Note, *Specifying The Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510 (1975). The Court recognized in *Roth* that the teacher's interests in his re-employment "were of major concern to him" 408 U.S. at 570, but it also recognized that the determination of whether procedural due process applied was, in the first instance, related to the nature of the interest rather than to the gravity of the deprivation that he might suffer. *See also Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring). Indeed, *Goss* v. *Lopez, supra*, stated that as "long as a property deprivation is not *de minimis*" the gravity of the interest was "irrelevant to the question of whether account must be taken of the due process clause." *See* Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. at 1512, n. 8.

This analysis is of primary importance in the instant case because the Court of Appeals, below, misapplied the requirements that this Court has laid out in determining whether or not due process applied in the first instance. *Gomes* v. *Travisono*, 490 F.2d 1209 (1st Cir., 1973), was vacated and remanded following this Court's decision in *Wolff*. In the remand, at 510 F.2d 537, the Court of Appeals misapprehended this Court's holding in *Wolff* and stated that *Wolff* reaffirmed the proposition that "prisoners suffering the prospect of serious deprivations are entitled to some process". 510 F.2d at 539. The First Circuit's error was repeated in the instant case. After comparing the differences between interstate transfers, as was the case in *Gomes*, and intrastate transfers, as was the situation in the case at bar, the Court of Appeals stated that the disadvantages here were both more serious and more certain than those flowing from interstate transfers, and thus the weight of the deprivations mandated similar procedures to those required by *Wolff*. In doing this the court specifically cited its second *Gomes* opinion that interpreted *Wolff* as holding that "prisoners suffering the prospect of *serious deprivations* are entitled to some process". (Emphasis supplied).

In the opinion below, the Court of Appeals never specifically analyzed the nature of the interest asserted. It, rather, assumed that there was a protected liberty interest in a prisoner remaining at an institution within the Commonwealth of Massachusetts by weighing the loss to the inmate upon transfer. The petitioners assert that the Court of Appeals was in error, not so much for the conclusion it reached, although we question that also, but, rather. for its failure to analyze the nature of the interest asserted in determining whether or not process was due.[5]

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[5] The First Circuit's view of due process as dependent upon the "weight" of the interest is not unusual. Although the cases are far too numerous to cite, a review of relevant lower court decisions in the prison context will almost invariably find the analysis turning on the question of how much loss the prisoner has suffered. Once the court determines that the loss has reached a certain quantum then due process is almost always mandated. Indeed, in *Carlo* v. *Gunter*, 520 F.2d 1293 (1st Cir., 1975) *vacating* and *remanding* 392 F. Supp. 871 (D. Mass., 1975), the First Circuit made no effort whatsoever at analyzing the nature of the interest. Rather, it simply looked at the alleged sufferings involved and determined that there was enough of an interest to mandate procedures. In doing so it vacated a very thoughtful order made by a district judge after a trial which occurred during a riot at the maximum security institution in Massachusetts. The Court of Appeals later denied rehearing without argument. The issue in question in *Carlo* was whether due process applied to *a cell reassignment within the same institution*. The First Circuit held process was due, even though the transfer was within the same prison, because harsher conditions of confinement were involved.

B. *Absent a Statutory Basis, a System of Regulations, or a Clearly Defined Factual Pattern a Prisoner Has Only a Unilateral Expectation of Remaining in Any Particular Prison.*

1. *A prisoner has no "liberty" interest in remaining in any particular prison within the Massachusetts correctional system.*

It is clearly established that the Constitution does not stop at the prison gate. *Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir. 1969). Petitioners do not contend otherwise. Indeed, in the First Circuit, at least since *Nolan* v. *Scafati*, 430 F.2d 548 (1st Cir. 1970), Massachusetts prison officials have been aware that they were under an affirmative obligation to provide "some assurance of elemental fairness" when dealing with substantial individual interests of prisoners. *Id.* The issue has never been whether the Constitution was applicable as a general matter but rather the degree to which it controlled in specific instances. It is clear that "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen . . . ." *Wolff*, at 555. Because liberty in its full sense is a concept of free men its retraction is warranted and justified by the considerations underlying our penal system, upon a criminal conviction. *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). "There is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff*, at 556, but what a "liberty" interest is in the prison context is a difficult and somewhat obscure question; particularly so when the "liberty" is allegedly a right to remain in one prison rather than another.

Wolff held that a state-created statutory right was "sufficiently embraced" by the Fourteenth Amendment so

as to mandate procedures to ensure that the right was not arbitrarily abrogated.[6] 418 U.S., at 557.

In the instant case Massachusetts has created no interest. As Judge Campbell said in his dissent below:

> ". . . it should be recognized that Massachusetts has not conferred a statutory right upon inmates to be at one institution rather than another. While Walpole is a more secure facility than Norfolk, a prisoner has no vested right to serve his term in one place rather than the other." (App. 153).

This case then differs from *Wolff*. The majority opinion below, however, did not address the issue in terms of a state-created interest, because to the First Circuit the question was not the nature of the interest. To the Court of Appeals the ". . . question thus becomes one of whether the detriment worked by an intrastate transfer from a medium security institution to a maximum security prison is *serious enough to trigger the applications of due process protections.* (App. 147). (Emphasis supplied.)

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[6] Good time credits have always been regarded as something of a special interest to state prisoners. Prior to *Wolff*, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) presented the question of whether or not an action could be pursued under 42 U.S.C. §1983 for the restoration of good time credits. The deprivation of good time credits is an issue of significantly different importance to an inmate than one affecting his specific place of confinement. Indeed, in *Wolff*, release could have been affected by up to eighteen months. Petitioners suggest that not only is good time an issue of fundamental importance to an inmate, but it is also something that is susceptible of objective identification when determining whether or not a grievous loss exists. Limiting determinations of grievous loss to such objective determinations as deprivations of good time or placement in segregation at the receiving institution would limit subjective approaches by the lower courts. Such a limitation to objective factors would prevent the question of whether grievous loss has been suffered from turning on subjective considerations going to the weight of the interest asserted.

We contend the Court of Appeals was in error. A prisoner has no liberty interest in being in a particular prison. Confinement in any institution creates no right to remain in that institution. As stated by Judge Campbell:

> "one must ask not only whether a particular event may cause loss to the prisoner but whether one in the position has any claim to what was taken away."

Judge Campbell further amplified this in a footnote to the dissent:

> A civil servant sent to Alaska, a soldier sent to Vietnam, or a prisoner sent to another institution may, in a private sense, suffer "grievous loss", but the nature of the organization and of their role precludes acknowledging any "liberty" or "property" right to remain in one location. Notwithstanding language in *Morrissey* v. *Brewer*, 408 U.S. 471, 481-84 (1972), cautioning against distinctions based on "privileges" as opposed to "rights", it is necessary to consider not only whether what happens causes subjective loss to the individual, but whether he has a right to any protection against that loss. (App. p. 154)

An argument which turns on the gravity of the deprivation will almost always require a subjective judgment by the individual judge. This creates a danger that constitutional analysis will be personalized and that "procedural" due process will become a substantive matter. *See Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970) (dissenting opinion of Mr. Justice Black). Again, as stated by Judge Campbell:

> "Prisoners are, by definition, prisoners. Changes in the conditions of confinement, whether involving a

> different cell assignment, a new meal schedule, or transfer to a new facility, seem to me to fall within the state's general right to confine, safeguard and rehabilitate. To treat them as "liberties" belonging to the inmate invites greater interferences with the management of prisons than seems either wise or constitutionally mandated." (App. 154).

Liberty is partially the ability to come and go, to do or not do, to conform or to rebel. It is a concept of free men rendered largely inapplicable by a criminal conviction. "The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual . . ." *United States ex rel. Miller* v. *Twomey*, 479 F.2d 701, 712 (7th Cir. 1973), but a criminal conviction does mean, at the very least, that the individual can no longer choose where he would prefer to be or not be. Unless the state has created or conditioned the interest, confinement in a particular institution does not implicate any "liberty" protected by the due process clause.[7]

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[7] Petitioners contend that there is no distinct "liberty" interest implicated by an entry in the prisoner's institutional file. A prisoner confined to a maximum or medium security institution does not have the same qualitative interest in maintaining his community standing as the students had in *Goss* v. *Lopez*, supra at 574 or the teacher had in *Board of Regents* v. *Roth*, supra at 573. The same danger to community standing does not exist here as existed in *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) because the individuals in question are simply not similarly situated. There is, and must necessarily be, harsh as it may seem in terms of constitutional analysis, a distinction between protections the due process clause affords free men when they are in an adversary relationship with the government and the protections that the constitution affords a prisoner confined as the result of a criminal sentence. There is no separate interest effected by an entry in the prisoner's institutional record. An entry that might indicate a transfer is nothing more than a reflection of the state's power to control, safeguard, and rehabilitate the individual given to their custody as a result of a criminal conviction.

2. *A property interest exists only when created by statute, regulation, or identifiable rules.*

Petitioners recognize that even if there is no liberty intrest inherent in a prisoner's desire for confinement in a particular institution the state may well create a "property" interest by statute, regulation, or a clearly defined factual pattern which can be shown to have created an entitlement in the inmate. *Goss* v. *Lopez* recognized that property interests are not normally created by the Constitution, 419 U.S. at 572.

> Rather, they are created and their dimensions defined by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

The welfare recipients in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) had statutory rights to their benefits. The inmates in *Wolff* had statutory rights, absent serious misconduct, to their good time credits. The teacher in *Perry* v. *Sinderman* was allowed to prove a *de facto* tenure program. The employee in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) was allowed to invoke the procedural protections of regulations entitling him to continued employment absent sufficent cause for discharge.

As *Roth* noted, certain attributes of property interests have emerged from the procedural due process cases decided by this Court in recent years.

> To have a property interest in a benefit, the person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient

> institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily underlined. It is a purpose of the constitutional right of a hearing to provide an opportunity for a person to vindicate those claims.

408 U.S. at 577.

In the instant case there are no statutorily created rights to remain in, or go to, any institution in the Commonwealth of Massachusetts, subsequent to the original sentencing decision. Until March of 1975 there were no specific regulations which dealt with the question of "classification" transfers. *See generally Carlo* v. *Gunter*, 520 F.2d 1296 n. 5. Until March of 1975 the Commonwealth of Massachusetts made do with a variety of draft procedures and informal policies which dealt with the question of intrastate transfer. At the time of the transfer of these plaintiffs there had been no regulations filed by the Massachusetts Department of Correction pursuant to the Commonwealth's Administrative Procedure Act. See Mass. General Laws, ch. 30A, § 5, ch. 30, § 37.

Moreover, there is nothing in the record that would indicate the existence of any *de facto* system such as was the case in *Perry* v. *Sinderman*. There are no reasons apparent in the record for the plaintiffs confinement at Norfolk. There is no conduct, evident from the record, which would indicate any pattern of behavior on the part of state officials which could be alleged to create a property entitlement in remaining at MCI, Norfolk.

The District Court and Court of Appeals both relied substantially upon the fact that the Commonwealth of Massachusetts had deliberately differentiated in levels of confinement between these two institutions. The petitioners suggest that the levels of confinement in existence at these institutions are constitutionally irrelevant absent a legi-

timate claim of entitlement to reman at either of the institutions. Absent a state created interest, cognizable as either liberty or property, the prisoners' interest in remaining in any particular institution constitutes only a unilateral expectation requiring no procedural protections prior to termination.

The fact that there may be, arguably, a form of "punishment" involved, or that the transfer itself might result in some form of hardship to the prisoner is also constitutionally irrelevant unless it can be shown that a legitimate claim of entitlement exists to the particular benefit in question.[8] If the prisoner's liberty or property interests are not implicated, the motivation of the Commonwealth in transferring the prisoner is of no constitutional significance. Unless a claim of entitlement can be established by the plaintiffs there is no constitutional interest affected by a transfer from a medium security institution to a maximum security institution. There are no rules in Massachusetts which prevent an inmate from being transferred from one prison to any other prison. Any inmate confined within the Massachusetts correctional system is subject to transfer no matter how exemplary his conduct at an institution. As a matter of practice, of course, this rarely, occurs; but, the harsh reality of prison life dictates that such questions not be frozen into a constitutional rule.

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[8] Petitioners also suggest that transfers of inmates from one institution to another is far less of a "grievous loss" than found by the Court of Appeals. While there is no doubt that MCI, Norfolk is a more desirable institution than MCI, Walpole, there is no loss in the instant case which would correspond to the loss suffered by the inmates in *Wolff* (up to 18 months good time) and *Morrissey* v. *Brewer*, (revocation of a conditional liberty, the freedom to be at large in society with minimal restraints). Indeed in the instant case there was no loss of good time and no segregation at the receiving institution. See n. 6, *supra*.

As stated by Judge Campbell:

> As prisoners are involuntary inhabitants and some are dangerous and unpredictable, administrators must decide whether a given inmate is more likely to escape from one place than another, and whether the mere presence of an inmate in a given setting is likely to be volatile and more dangerous. Such judgments may often be little more than educated guesses based on suspicions. They may involve predictions of future dangerousness which in turn echo assumptions as to the inmates role in past disturbances. While I can understand the argument that no adverse assumptions should ever be made without minimal due process — hearing, confrontation of witnesses, and the like — I do not think the realities of the state-prisoner relationship admit to classifying such decisions, when relating to a transfer, as a liberty interest of the prisoner. Penal authorities will perhaps think it best to afford safeguards, but I do not think the Constitution can reasonably be said to require them. (App. 155)

II. EVEN IF THERE IS FOUND IN THIS CASE AN IDENTIFIABLE "LIBERTY" OR "PROPERTY" INTEREST PROTECTED BY THE CONSTITUTION SO AS TO MANDATE THE PROTECTIONS OF THE DUE PROCESS CLAUSE THE PROCEDURES FOLLOWED BY PETITIONERS WERE FULLY ADEQUATE.

A. *Balancing the Interests in This Case Requires That the Paramount State Interest Be Recognized.*

The procedures that ". . . due process may require under any given set of circumstances must begin with the determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961).

"The very nature of due process negates any concept of inflexible procedures universally applicable to any imaginable situation." *Id.* As noted by Mr. Justice Frankfurter in *Joint Anti-Facist Committee* v. *McGrath,* 341 U.S. 123, 162-163 (1951) "Due process, unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reason, the past course of decisions . . . ." *See also Cafeteria Workers* v. *McElroy, supra,* at 895.

In determining the precise nature of the government function the question involved in the prison context is necessarily more complex.

> ". . . It is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints to the very different situation presented by a disciplinary proceeding in a state prison." *Wolff,* at 560.

Because of the atmosphere in which the hearings must occur, the full panoply of due process procedures that have been required in other contexts are inappropriate to the prison environment. As *Wolff* noted:

> "Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. . . . They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life . . . Guards and inmates co-exist in direct and inmate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace.

> Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner."

418 U.S. at 561-562.

If, as *Wolff* found, the disciplinary proceedings in the Nebraska Penal Institution required a sensitive and considered application of procedures, what must be the case here? The record discloses that since the last week of August, 1974, the institution at Norfolk had suffered series of fires which clearly placed the security of the entire institution in jeopardy. Petitioners contend that when Meachum was informed of the plaintiffs' involvement in the disruptions occurring at the institution he was justified, if not obliged, to take immediate and direct action to secure and order the institution. Because the precise nature of the government function involved in this case is of such sensitivity and such importance to the safety of the Norfolk population, petitioners suggest that the procedures required of them, assuming arguendo that procedures were in fact mandated, are limited to notice to the inmate of the proposed transfer and an opportunity for that inmate to be heard in opposition to the transfer. Petitioners suggest that to require more complete procedures in a situation such as presented by this case would be to add to the potential danger inherent in such situations, as well as to possibly escalate the confrontations which necessarily occur between inmates and authority when any question of misconduct is present. *cf. Wolff,* at 562.

Moreover, transfers may be carried out for a variety of reasons. They may occur for reasons of punishment. They may be carried out for reasons of space allocation within the institution, for reasons of program availability or unavailability at a particular institution, or simply on general grounds which are not capable of precise identifica-

tion. The Court of Appeals in its opinion below, following its earlier opinion in *Gomes* v. *Travisono*, 510 F.2d 537 (1974) refused to analyze the transfers in terms of whether they were of an administrative rather than punitive nature. In doing so, we suggest, the Court of Appeals was, in effect, requiring correction officials to *prove* charges of misconduct as a matter of *procedural* due process prior to the transfer. If the Court of Appeals is correct in assuming that administrative and punitive transfers ought not to be distinguished then the purpose of the hearing, whatever the reason for the transfer, will be always to force correction officials to substantially justify the purpose of whatever administrative action they are going to take, i.e., transfer. For a further example of the Court of Appeals analysis insofar as it tends to a substantive judgment of what correction officials do *See Carlo* v. *Gunter*, 520 F.2d at 1297, where Judge McEntee required hearings to determne whether or not there was a "reasonable basis" *for a cell transfer within the same institution.* The approach of the Court of Appeals requires substantive rather than procedural judgments. The approach is itself a subtle repudiation of the due process concept that the procedures themselves will insure the accuracy of the fact finding process. *cf. Arnett* v. *Kennedy, supra,* at 178 (opinion of Mr. Justice White).

As stated by Judge Campbell in a footnote to his dissenting opinion below:

> Administrative realities may sometime necessitate the flexibility to transfer even on the basis of demonstrably inadequate information. If, for example, the warden has narrowed the likely cause of disruption down to several inmates, he may deem it prudent to transfer all without having proof that all are involved. A forty percent risk that an inmate will disrupt or set a fire may, in some circumstances, be too great to take. The safety of other inmates and prison personnel may have to be weighed against fairness to certain individuals.

B. *Due process was satisfied by notice of the proposed transfer and an opportunity to be heard.*

In terms of analyzing the precise nature of the governmental function and interest, it should be apparent that whatever the range of alternatives available to correction officials in other situations, they were simply not present here. Unless a hearing can determine with absolute certainty the fact that the informants are incorrect, there is no alternative to a transfer. Meachum's obligation to personnel at the institution, not to mention the inmates confined to the institution, dictated that he take specific and firm action to remove those who had been identified to him as the cause of the disruption. To require, as the District Court and the Court of Appeals have required, that the case be treated as one would treat an ordinary administrative matter is to both misapprehend the nature of the problem which faces correction officials as well as to fail to appreciate the sensitivity and dangers inherent in a prison environment. One may gather from the opinions of the Court of Appeals that correction officials are required to establish, on the record, a "rational basis" to effect a transfer. See 520 F.2d at 1297. The analysis of the Court of Appeals goes substantially beyond what this Court required in either *Wolff* or *Morrissey* v. *Brewer, supra.*

A hearing which will determine whether or not good time credits were justifiably removed is functionally different than a hearing which must determine whether or not a purportedly disruptive inmate should be removed from an institution. The question of whether the misconduct

occurred so as to justify the removal of good time is an issue generally susceptible of resolution within the institution. Once the hearing occurs and a decision is reached the matter is closed. In cases similar to the instant one, however, no such resolution can be reached. Even if an inmate can establish by reasonable evidence that he might not be the cause of disruption his transfer may yet have to occur because the obligations of the superintendent to the safety and security of other individuals may well prevent him from waiting until there is uncontrovertible proof of a bad act. (See App. 154, n. 2).

The transfer of an inmate based on a prediction of future bad acts is, then, an issue radically different from the question faced by this court in *Wolff*. In disciplinary proceedings the hearing may encompass the question of whether or not the alleged misconduct did in fact occur. Action taken by correction officials as a result of that hearing is then truly punitive. A transfer hearing is an entirely different matter. It may bear aspects of a disciplinary hearing insofar as allegations of past misconduct may be heard but it is also truly "administrative" insofar as it must determine the question of how past conduct bears upon future behavior; and whether or not that behavior is consistent with institutional goals. The question of whether to transfer an individual from one institution to another is rarely, if ever, susceptible of the precise issue identification that is the case in disciplinary proceedings. Questions such as those which faced the Classification Board below are not susceptible of easy "yes" or "no" answers. Hard decisions have to be made and, if any procedures are found to be due, they must necessarily recognize the need for administrative flexibility.

Once it is determined that due process procedures are required the question then becomes what particular procedures are due under the circumstances of the case.

> [A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof however informal.

Londoner v. *Denver*, 210 U.S. 373, 386 (1908).

In *Joint Anti-fascist Refugee Committee* v. *McGrath*, supra, Mr. Justice Frankfurter said that "a person in jeopardy of serious loss" must be given "notice of the case against him and an opportunity to meet it." 341 U.S. at 171-172. This court recognized in *Wolff* v. *McDonnell* that the procedures appropriate to a prison administrative hearing were necessarily more limited than those required outside of the prison context. Nevertheless, when a process is found to be due, the question remains as to what must be minimally afforded. Judge Henry Friendly has asserted that the elements of a fair hearing must include

1. An unbiased tribunal;
2. Notice of the proposed action and grounds asserted for it;
3. An opportunity to present reasons why the proposed action should not be taken.

Friendly, *"Some Kind of Hearing"*, 123 U. Penn. L. Rev. 1267 (1975).

Although he discussed other elements of due process, Judge Friendly found these procedures to be fundamental. Petitioners suggest that Judge Friendly's statement is a fair and adequate criteria for what ought to be required here. As this Court recognized in *Wolff* the right to present evidence was basic to a fair hearing. The right to call witnesses, however, carried the potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out

the correctional program. 418 U.S. at 566. Petitioners suggest that the rationale employed in *Wolff* should be controlling to the facts of this case.

The plaintiffs in the instant case were afforded a notice of the proposed transfer. They were given the opportunity to be heard in opposition to the transfer. They were represented by competent counsel at the hearing, something that *Wolff* did not mandate. And, they were further afforded the right to call witnesses and appeal the decision of the board to the Commissioner of Correction and to make such arguments to the Commissioner as would bring to his attention what they regarded as unfair treatment in the institution. In the context of this case, petitioners surely cannot be required to do more.

C. *Due Process Does Not Require That Informant Information Be Disclosed When Doing So Will Jeopardize Institutional Security or the Safety of the Informants.*

The basis of the action by the Classification Board was information presented to it by Superintendent Meachum. When Meachum appeared before the board, the board inquired into the credibility of the informants and the reliability of their information. It was determined that to provide the plaintiffs with a summary of the evidence beyond the general assertions contained in the notice, and the oral representation that the decision of the board was based upon Meachum's testimony, would be to seriously compromise the physical safety of the informants.

This situation was clearly foreseen by this court in *Wolff* when it said:

> "Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing

> reasonable personal safety for guards and inmates may be at stake to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process." 418 U.S. at 562.

Petitioners suggested to the Court of Appeals that the information given to the inmates was within the parameters recognized by *Wolff* ". . . when personal or institutional safety [was] so implicated" that the representations made to the inmate ". . . may properly exclude certain items of evidence." 418 U.S. at 565. The Court of Appeals rejected the petitioner's contention and stated "this *cryptic reference* offers us little assistance in our effort to determine whether the prison officials were within their authority here in declining to reveal substance of the informant statements." (App. 154) (Emphasis supplied).

Petitioners suggest that this Court's language was far from "cryptic". We think this Court recognized in *Wolff* the significant dangers that exist in prison confrontations. In the circumstances present here, a notice of the proposed transfer, an opportunity to be heard in opposition to the transfer, as well as the opportunity to present testimony and appeal to the Commissioner of Correction was fully adequate to satisfy due process. These procedures allowed the inmate to state his version of the events occurring at the institution and to argue against the transfer presenting whatever evidence he saw fit. From the perspective of what the hearing was designed to accomplish, the procedures followed by the petitioners were also functionally adequate.[9]

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[9] Petitioners contend, obviously, that the Court of Appeals misapplied *Wolff* v. *McDonnell*. However, petitioners also suggest that the Court of Appeals has approached the problem of informant information in a rather inconsistent manner. Compare the First Circuit's resolution of the instant case with its resolution of the case of *McLaughlin* v. *Hall*, 520 F.2d 382 (1st Cir., 1975), a case

It is important to note that commentators agree with the position asserted by the petitioners as to the need to protect the safety and security of the informants. Judge Friendly describes the informant cases as the "strongest" ones for dispensing with the necessity for full procedural protections. 123 U. Penn. L. Rev. at 1286; *see also,* 88 Harv. L. Rev. at 1531. In this case the petitioners have been able

> ". . . to point to identifiable individuals whose interest in personal safety would have been jeopardized by granting the requested procedures. Second, such persons . . . clearly have standing to enlist the protections of the courts if their safety were imperiled by private individuals. Finally, the causal nexus between withholding requested procedures in preventing injury to the rights of informants [is] clear and direct. Therefore, this aspect of the *Wolff* decision seems to be a clear case when the government is justified in limiting the individual's right to due process in order to protect the rights of others." *Id.*

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decided on the same day as the instant case. In the matter at bar, the Court of Appeals affirmed the District Court's finding that the *disciplinary* procedures at Walpole were controlling; but in *McLaughlin* v. *Hall, supra,* it held that *Wolff* required that the "development of specific procedural requirements beyond those enumerated in [*Wolff*] must be left in the first instance to the sound discretion of correction authorities." In a footnote to its *McLaughlin* opinion, the court noted that while it rejected imposing a specific constitutional rule requiring *in camera* examination it did suggest that in lieu of such *in camera* examination, where such would be inadvisable, the authorities "may well devise other ways of indicating on the record indicia of reliability and the steps taken to verify information." See 520 F.2d at 385, n. 4. While *McLaughlin* may not be directly inconsistent with *Fano*, it certainly would appear that the First Circuit applied a somewhat divergent analysis to the two cases, even though both opinions were released on the same day.

Moreover, as argued above, the functional difference between the disciplinary hearing when the question is centered on the truth of the charges, is far different from the specific question presented in a transfer case when the security of the institution is implicated. Even if reasonable doubt can be cast upon the informant information, the necessity for administrative action is not substantially altered. The evaluation of the credibility of informant information when the physical security of an institution is in question must always be made by correction officials. It is the situation noted by Judge Campbell where administrative reality must necessarily require the ability to transfer even on the basis of demonstrably inadequate information. In terms of analyzing the functional adequacy of the procedures afforded in such situations, it should be kept in mind that correction officials have no interest in acting on arbitrary or capricious information. Unless officials are willing to proceed only on rational grounds, then their action can only further erode whatever limited confidence inmate and custodian now repose in each other. To this extent, the interests of the state and the interests of the inmate are essentially congruent.

The state's concern is in the security of its institutions and the correction and reabilitation of those committed to its custody. This interest cannot be served by arbitrary or capricious behavior. The good faith of Massachusetts correction officials must be presumed, particularly when the situation facing them is a very sensitive balancing of the rights of inmate informants with those who the informants have identified as dangerous to institutional security. The state's interest, broadly put, is the proper functioning of its prison system with a goal toward the security of that system and the rehabilitation of those committed to its care. Cf. *Goss* v. *Lopez,* supra, at 591, (dissenting opinion of Mr. Justice Powell).

In the case at bar, petitioners have afforded every significant right required by due process, with the specific exception of those procedures which would compromise the safety and security of the informants. The application of an interest balancing test, which would weigh the rights of the plaintiffs to the procedures requested, against the weight of the state's interest—as well as the interest of the inmate informants—would clearly show that the process afforded was both functionally adequate and meaningful in the full sense of due process. The full procedures which are described in *Wolff* for disciplinary hearings are largely unsuitable for the types of decisions necessary to effect a transfer. The procedures followed by the petitioners in the hearings below recognized this. We contend that they were consistent in every respect with the holding in *Wolff* and with the rationale behind that holding. Surely, when a hearing cannot function so as to serve the purpose for which it is designed, it cannot be constitutionally mandated. If this court should determine that process is indeed due, then it should find that the Constitution is served by a notice to the inmate of the proposed action and an opportunity for that inmate to be heard in opposition to the action. Further procedures, and the details of such procedures, should be left to the good faith of correction officials and not inflexibly set into constitutional law.

Conclusion

The Fourteenth Amendment operates only to protect identifiable liberty or property interests. We argue that the Commonwealth of Massachusetts has created no such interest in the instant case. We further contend that an inmate has no inherent liberty interest in remaining in any one particular institution in the Commonwealth of Massa-

chusetts. If, indeed, it is the nature of the interest rather than the weight of the interest which is important, then an inmate must establish a legitimate claim of entitlement to the benefit asserted and the Court must specifically find that the liberty or property interest is within the meaning of the Fourteenth Amendment. Many federal courts, including the First Circuit Court of Appeals, have rested the question of whether or not procedures are due upon the "weight" of the interest asserted by the claimant. Such an analysis tends towards a subjective approach to due process, an approach which is inconsistent with sound constitutional analysis.

If "grievous loss" is to be a touchstone of due process, then "grievous loss" must be limited to clearly objective deprivations, such as loss of good time or placement in administrative segregation or tangible evidence of real harm. Constitutional analysis must exclude reference to speculative injuries which a transfer might encompass, such as "harsher living conditions" or "adjustment to a new environment". The petitioners do not suggest that these considerations are meaningless, merely that they assume the worst while, at the same time they are factors which are not subject to any measurable standard. It is important to recognize that while objective standards of fairness are a necessity in prison life, even the most stringent safeguards will not satisfy everyone. Neither the prison system nor the judicial system functions in this manner. Perceptions will vary according to the subject and there will be those who remain unconvinced of the fairness of any system so long as the ultimate control of their lives and destiny belongs to anyone other than themselves.

Prison officials deal with volatile and dangerous situations on a daily basis. They must be afforded the widest possible discretion consistent with the fundamental guaran-

tees of our Constitution. The decisions that correction officials must make often require a sensitive and delicate balancing of interests, rights, and desires. The duty petitioners owed to the inmate informants, as well as the other inmates confined at MCI, Norfolk, required that the procedures afforded the plaintiffs be limited to a notice of the proposed transfer and an opportunity to be heard in opposition to the transfer. The procedures followed by the petitioners were adequate, in the context of this case, to provide fundamental fairness to the plaintiffs. They were also required to insure that the physical safety of the inmate population and the security of the institution would be guaranteed.

For all of the reasons stated in this brief, the petitioners request that the judgment of the Court of Appeals for the First Circuit be reversed.

Respectfully submitted,

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APPENDIX A.

Constitutional and Statutory References

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

MASSACHUSETTS GENERAL LAWS

CH. 30 A, § 5

§ 5. Regulations; Filing; Duty of State Secretary.

The regulations of each agency shall be filed with the state secretary under the requirements of section thirty-seven of chapter thirty. Upon receipt of a regulation prepared in accordance with any general or special law, the state secretary shall accept it for filing and endorse thereon the time and date of the filing. Such endorsement by the secretary shall be prima facie evidence of compliance with any regulation-making filing requirement imposed by law.

§ 37. Taking Effect of Certain Rules and Regulations; Filing and Indexing Thereof.

Notwithstanding any special or general law, every department, commission, board or official vested by law with the power to make and issue rules and regulations general in scope shall file an attested copy thereof, together with a citation of the law by authority of which the same purport to have been issued, and together with the dates of approval by other boards or agencies if required and any other information necessary to show compliance with statutory requirements relative to issuance of such regulations, with the state secretary, and such rules or regulations, whether or not they require the approval of the governor, the governor and council or other authority before taking effect, shall not take effect until so filed. A copy of such rules and regulations shall also be filed with the state librarian. The foregoing provision shall not apply to rules or regulations issued by commissions, boards or officials of towns, or to municipal ordinances or by-laws, or to the welfare compensation plan and rules and regulations established in accordance with the provisions of section forty-seven D of chapter thirty-one, or the rules or regulations affecting solely the internal management or discipline of a department, commission, board or office, nor to orders or decrees made in specific cases within the jurisdiction of a department, commission, board or official. The state secretary shall file and index all rules and regulations filed with him hereunder, noting and keeping available such references to preceding rules and regulations as may be necessary for certification purposes.

§ 38C. Superintendent of Institution to Report Commission of Felony to District Attorney.

Whenever the superintendent of a correctional institution of the commonwealth determines that a felony has been committed therein, he shall forthwith notify the district attorney for the county in which such institution is located. (1960, 807.)